United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1177

To be argued by
JOHN M. WALKER, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1177

UNITED STATES OF AMERICA,
Appellee,

—v.—

JOSEPH MARANDO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JOHN M. WALKER, JR.,
JOHN D. GORDAN, III,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Joseph Marando appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on January 11, 1974, on his plea of guilty before the Honorable Inzer B. Wyatt, United States District Judge.

Information 73 Cr. 1037, filed November 15, 1973, charged Marando in one count with conspiracy to make an extortionate extension of credit and to collect payments by extortionate means, in violation of Title 18, United States Code, Section 371. Marando waived indictment and pleaded guilty to the information the same day.

On January 11, 1974, Marando was sentenced to 5 years imprisonment, the execution of sentence was sus-

pended, and Marando was placed on probation for five years.* Marando is presently on probation.

Statement of Facts

On November 15, 1973, Joseph Marando appeared before Judge Inzer B. Wyatt to waive indictment and plead guilty to Information 73 Cr. 1037, which superseded Indictment 72 Cr. 599.** The superseding information charged Marando in one count with conspiracy to make an extortionate extension of credit and to collect extensions of credit by extortionate means, in violation of Title 18, United States Code, Section 371.*** Specifically, the information charged that in August and September of 1970, Marando loaned Kelly Andrews and Bradley, Stuart Schiffman, Perry Scheer and Fred Miller $25,000 at an interest of 2% per week with the understanding that delay or failure to repay could result in the use of violence or other criminal means to cause harm to the person, reputation and property of the debtors, and that approximately once per week thereafter Marando collected $500 in interest from Schiffman, Scheer and Miller. The information further alleged as overt acts in furtherance of the conspiracy: (1) the delivery by Marando to Schiffman of $15,000 in August, 1970; (2) the delivery by Marando to Schiffman, Scheer and Hiller of $10,000 in September, 1970, and (3) the collection by

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* In another case Marando, on September 5, 1973, was sentenced after trial by Judge Motley to two years imprisonment for conspiracy and mail fraud, the execution of sentence was suspended, and Marando was placed on 5 years probation. *United States* v. *Marando*, 73 Cr. 79, *aff'd.*, Dkt. No. 73-2378 (2d Cir., July 3, 1974).

** Indictment 72 Cr. 599 charged Marando in eight counts with making an extortionate extension of credit (Title 18, United States Code, Section 892) and with seven instances of collection of credit through extortionate means (Title 18, United States Code, Section 894). The maximum penalty on each count is 20 years imprisonment and a $10,000 fine.

*** The maximum penalty for violation of Section 371 of Title 18 is five years imprisonment and a $10,000 fine.

Marando of $500 per week from the debtors from September, 1970 to September, 1971.

At the pleading, Marando, through his attorney, requested a series of four amendments to the information, to which the prosecutor agreed (Tr. 11/15/74 at 3, 8). Marando acknowledged that he had read and had had explained to him the contents of the information, and, orally and in writing, he waived indictment (*Id.* at 5). The Court then thoroughly explained the charge contained in the information to Marando, who acknowledged that he understood the information, that the facts alleged in the information were true and that he was guilty of the crime charged. The Court then satisfied itself that Marando believed he was in fact guilty, that he knew he was giving up his right to a jury trial, that he knew the consequences of his plea, that no promises or threats had induced the plea, that he had discussed the matter with his lawyer, and that he felt in sufficient health physically and mentally to know what he was doing. The plea was accepted, and Marando was released on his own recognizance pending sentence on January 11, 1974. (*Id.* at 7-12).

On January 11, 1974, the date of sentence, counsel for Marando moved to be relieved and to have substituted as Marando's counsel a Mr. Caplan, who asked for a one-month adjournment so that he could file a motion for withdrawal of Marando's guilty plea (1/11/74 Tr. 1-5). The basis for these applications was expounded on at length by Marando's counsel (*Id.* at 6-17). While his statement was rambling and incoherent, he appears to have claimed that he had evidence that two of the victims named in the information had perjured themselves as government witnesses at a prior trial of Marando and elsewhere and that the United States Attorney's Office was offering these witnesses deals if they produced "some evidence against important political people in Brooklyn." Counsel went on to say: "Apparently my name has been thrown around in order to link it up as part of this plot against the Democratic organiza-

tion of Kings County" (*Id.* at 7-11). Counsel asserted that the United States Attorney's Office had attempted to recruit Marando to "get certain politicians in Brooklyn." Pointing out that Marando had been indicted again,* he also claimed that he had been told by other attorneys that the prosecutor "would continue to indict and indict Mr. Marando until such time as some judge could be found some place that would put him in jail . . ." but conceded that "in connection with this plea, I had asked Mr. Walker for a guarantee or pledge that no further indictments would be forthcoming against Mr. Marando in view of his health, in view of his condition, in view of the fact of what he has gone through, and Mr. Walker didn't go along with that, I must say that" (*Id.* at 12, 14).

Judge Wyatt denied Marando's applications (*Id.* at 17) and, after a brief colloquy, reviewed the circumstances of the plea with Marando's counsel, Mr. Meissner:

> "The Court: He pleaded guilty and he told me that, and we went over it very carefully, the information, and in fact it was corrected by Mr. Marando and by you in the hearing before me and it is shown in pen and ink on the information.
>
> Mr. Meissner: Yes, your Honor.
>
> The Court: And he said that it was true as corrected.
>
> Mr. Meissner: That he did make that loan, yes, your Honor, no question about it.
>
> The Court: That he violated the law.
>
> Mr. Meissner: Yes, your Honor.
>
> The Court: And he pleaded guilty because he believed he was guilty" (*Id.* at 24).

After statements by Mr. Meissner and Marando bearing on sentence, Judge Wyatt observed that at the plea "we

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* Indictment 73 Cr. 1083 was filed on December 10, 1973 charging Marando in 25 counts of conspiracy, mail fraud and securities fraud and is scheduled for trial in late October, 1974.

went carefully over the information" and that changes in the information had been made in the interest of accuracy "at the suggestion of Mr. Marando and his counsel" (*Id.* at 29). The Judge then imposed a sentence of 5 years imprisonment, execution suspended, and placed Marando on probation for 5 years.

ARGUMENT

Marando has no absolute right to withdraw his guilty plea before sentence and the trial court properly exercised its discretion in denying his motion.

Marando contends that Judge Wyatt deprived him of an absolute Constitutional right to withdraw his guilty plea before sentence and that, even if an absolute right to withdraw his plea is not Constitutionally provided, Judge Wyatt abused his discretion in denying his application to withdraw it. These contentions are frivolous.

While a defendant is entitled to have his guilty plea set aside if the prosecution violates a plea bargaining agreement, *Santobello* v. *New York,* 404 U.S. 257 (1971), if the plea results from threats by the prosecutor, *Machibroda* v. *United States,* 368 U.S. 487 (1962), or crucial misrepresentations by defense counsel, *Mosher* v. *LaVallee,* 491 F.2d 1346 (2d Cir.), *cert. denied,* —— U.S. ——, 94 S. Ct. 1611 (1974), or if the *voir dire* on the plea does not comply with Rule 11 of the Federal Rules of Criminal Procedure, *McCarthy* v. *United States,* 394 U.S. 459 (1969), no such error is claimed here. Accordingly, whether to permit Marando to withdraw his guilty plea prior to sentence was entirely within Judge Wyatt's discretion, and his decision is subject to reversal only if clearly erroneous. *United States* v. *Lombardozzi,* 436 F.2d 878, 881 (2d Cir.), *cert. denied,* 402 U.S. 908 (1971). The burden of establishing adequate grounds

for withdrawal of a guilty plea before sentence is on the defendant. *United States* v. *Fernandez*, 428 F.2d 578, 580 (2d Cir.), *cert. denied*, 400 U.S. 997 (1970); *United States* v. *Giuliano*, 348 F.2d 217 (2d Cir.), *cert. denied*, 382 U.S. 946 (1965). Under such circumstances, ". . . the occasion for setting aside a guilty plea should seldom arise." *United States* v. *Rawlins*, 440 F.2d 1043, 1046 (8th Cir. 1971).

Here it is obvious from the record that Marando established no grounds whatsoever for withdrawal of his guilty plea. Indeed, much of what his counsel said had nothing to do with Marando at all. His counsel did not even assert that Marando was innocent of the charge in the information, a prerequisite to the relief sought. *United States* v. *Hughes*, 325 F.2d 789, 792 (2d Cir.), *cert. denied*, 377 U.S. 907 (1964).* Nor could he, in view of Marando's prior admission of guilt to Judge Wyatt during a *voir dire* which fully complied with Rule 11.** The most that can be drawn from Marando's counsel's statement is that Marando was resentful of being indicted again after his guilty plea to the information, but in view of his counsel's concession that, during the negotiations which led to Marando's guilty plea to the information, the prosecution had rebuffed his request for assurances that no further charges would be brought against Marando, it is obvious that Marando anticipated that further charges would be brought even if he pleaded guilty to the information.

In short, it can hardly be suggested on this record that Judge Wyatt abused his discretion in refusing to permit Marando to withdraw his guilty plea. Indeed, the applica-

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* Even a bare assertion of innocence would have been inadequate. *United States* v. *Smith*, 407 F.2d 33, 35 (2d Cir. 1969).

** His admission of guilt also rendered wholly irrelevant, even assuming its truth, Marando's claim that the victims of his extortionate activity had perjured themselves in other proceedings.

tion was so lacking in basis that there was nothing for Judge Wyatt to exercise his discretion about.*

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JOHN M. WALKER, JR.,
JOHN D. GORDAN, III,
Assistant United States Attorneys,
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* Marando's alternative claim—that Judge Wyatt should have given him the requested 30 days to file a written motion to withdraw the plea—is wholly frivolous. Judge Wyatt heard Marando's counsel at length in connection with these applications, and no adequate basis whatsoever, supported or unsupported, was articulated for the motion to withdraw the plea. Given the dictates of Rule 32(a) of the Federal Rules of Criminal Procedure, the period of almost two months between plea and sentence, and the wholly illusory basis for the application, Judge Wyatt acted entirely correctly in going forward. See *United States* v. *Maxey*, 498 F.2d 474 (2d Cir. 1974).

★ U. S. Government Printing Office 1974— 614—207—421-74

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York }
County of New York }

DIANE MUSRACA being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 16 day of OCTOBER, 1974 she served a copy of the within APPELLATE BRIEFS (2) by placing the same in a properly postpaid franked envelope addressed:

NORMAN I. CAPLAN, Esq.
535 Fifth Ave
New York, N.Y. 10017

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Diane Musraca

Sworn to before me this
16 day of October, 1974

Mary L. Avent

MARY L. AVENT,
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. Filed in Bronx County
Commission Expires March 30, 1975